

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-SAJ
)	
TYSON FOODS, INC., et al.)	
)	
Defendants.)	
)	

**TYSON DEFENDANTS' NOTICE OF WITHDRAWAL OF REQUEST
FOR ORAL ARGUMENT ON DOCKET NOS. 64 AND 65 AND
SUGGESTION REGARDING JUNE 14-15, 2007 HEARING**

Defendants' Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. ("Tyson Defendants") hereby submit the following notice in connection with the hearing scheduled for June 14 and 15, 2007.

1. All parties to this action joined in a request for oral argument on all motions filed by the defendants seeking relief under Fed. R. Civ. P. 12(b) and 12(c). *See* Joint Motion (Dkt. No. 1071). The Court has granted that request and has scheduled a hearing for June 14 and 15, 2007 for oral argument on eight (8) different 12(b) and 12(c) motions pending in this case. *See* 4/13/2007 Minute Order (Dkt. No. 1126).¹

2. Given the stage of this litigation, it is in the best interests of all parties for the June 14 and 15 hearing to proceed expeditiously. The Tyson Defendants intend to

¹ The Minute Order only lists the 12(b) motions. However, the Court clarified at the May 2, 2007 hearing that the parties would also be allowed to present oral argument on the 12(c) motions (Dkt. Nos. 1004, 1064 and 1076) at the June 14 and 15 hearing if time permits. Three of the docket numbers listed on the minute order (Dkt. Nos. 74, 90 and 91) are simply docketing entries by the Clerk of the Court related to or referencing one of the eight motions set for hearing.

present oral argument, where necessary, on all pending dispositive motions so that the Court will be in a position to resolve those motions at its earliest opportunity following the June 14 and 15 hearings.

3. In order to expedite the June 14 and 15 hearings and to ensure that adequate time remains for oral arguments on all pending 12(b) and 12(c) motions, the Tyson Defendants withdraw their request for oral argument on two of the 12(b) motions. Defendant Tyson Poultry, Inc.'s Motion to Dismiss Count 3 (Dkt. No. 64) involves discreet and uncomplicated legal issues arising from Plaintiffs' claim under the Resource Conservation Recovery Act. 42 U.S.C.A. § 6972. Defendant Tyson Chicken, Inc.'s Motion to Dismiss Counts 4, 5, 6 and 10 (Dkt. No. 65) is based principally on a single case – *Connecticut v. American Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) – and argues that certain claims advanced by Plaintiffs present non-justiciable political questions. Both of these motions are well briefed by both sides and the Tyson Defendants would request that the Court decide these motions on the briefs. In the event, the Court has questions related to these two motions, counsel for the Tyson Defendants will be prepared to answer such questions, but the Tyson Defendants do not intend to consume valuable time during the June 14 and 15 hearing presenting detailed oral argument on these motions.

4. While the Tyson Defendants defer to the Court on the sequence of argument on the various motions to be heard on June 14 and 15, they respectfully make one suggestion in regard to order. Defendants' Motion for Judgment on the Pleadings in Light of *New Mexico v. General Electric* (Dkt. No. 1004) should be argued before Defendants' Motion for Judgment on the Pleadings in Light of Plaintiffs' Constitutional

Violations. Under either of these motions, the Court could rule that it is improper for the State of Oklahoma to pursue the instant action through private attorneys under a contingency fee agreement. The *New Mexico* Motion (Dkt. No. 1004) is based upon the provisions of the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601-75 (as interpreted by the Tenth Circuit), whereas the Constitutional Violation Motion (Dkt. No. 1064) is based upon provisions of the United States and Oklahoma Constitutions. Under the canon of constitutional avoidance, this Court should first consider CERCLA’s statutory provisions and construe, if possible, those provisions in a manner that will avoid the necessity to resolve the constitutional questions raised in the Constitutional Violation Motion. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (invoking canon of construing statutes to avoid serious constitutional questions); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (holding that, under doctrine of constitutional avoidance, courts will adopt any tenable interpretation of a statute that avoids serious constitutional questions).

Dated: June 11, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of June 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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